

What's New In The New DOT DBE Rule?

The Department of Transportation's new disadvantaged business enterprise (DBE) program final rule (49 CFR Part 26) makes significant changes that will affect recipients, DBEs, and non-DBE contractors who participate in the program. This paper summarizes the major changes from the old rule.

Setting and Meeting DBE Goals

- The rule explicitly prohibits the use of quotas. The rule also explicitly prohibits the use of set-asides, except in extreme cases to remedy egregious problems. The rule explicitly provides that recipients will not be penalized for failing to meet their DBE goals. **[The old rule did not use, but also did not explicitly prohibit, quotas. It explicitly authorized set-asides under some circumstances. The Department never penalized recipients for failing to meet goals under the old rule, but the text of the rule did not make the point explicitly.]**
- The rule views the statutory 10 percent goal as a nationwide aspirational goal, which does not require that recipients set their goals at 10 percent or any other particular level. **[Under the old rule, recipients who had less than a ten percent goal had to make a special justification to the Department.]**
- Recipients must set overall goals to represent a "level playing field" - the amount of DBE participation they could realistically expect in the absence of discrimination. This goal must be based on demonstrable evidence of the availability of ready, willing and able DBEs to participate on your DOT-assisted contracts. The rule gives recipients substantial flexibility in the methods they choose to set overall goals. **[Under the old rule, overall goals were set to achieve the object of "maximum practicable" use of DBEs. The recipient's goal could be based directly on the 10 percent national goal or on the recipient's past achievements.]**
- Recipients must obtain as much as possible of the DBE participation needed to meet their overall goals through race-neutral measures. Race-neutral measures include such activities as training, technical assistance, bonding assistance, business development or mentor-protégé programs, breaking contracts up into pieces that small businesses can readily perform, and awards of prime contracts to DBEs through the regular competitive process. One type of race-neutral measure, a prompt payment provision, will be required for all subcontractors, DBEs and non-DBEs alike. **[The old rule did not mandate the use of race-neutral measures or give them priority. There was no prompt payment requirement.]**
- Contract goals, or other race-conscious measures, must be used only to obtain DBE participation needed to meet overall goals that cannot be obtained through use of race-neutral measures. Contract goals are not required on every contract. If recipients are overachieving or underachieving their overall goals, they have to adjust their use of contract goals. **[Under the old rule, contract goals were required on all contracts with subcontracting possibilities, regardless of whether the contract goals were needed to meet overall goals.]**
- When there is a contract goal, a bidder must make good faith efforts to meet it. The bidder can do so either through obtaining enough DBE participation to meet the goal or documenting the good faith efforts it made to do so. The rule explicitly provides that recipients must not disregard showings of good faith efforts, and it gives bidders the right to have the recipient reconsider a decision that their good faith efforts were insufficient. **[The old rule employed the same good faith efforts mechanism, but did not emphasize as strongly the mandate that recipients seriously consider good faith efforts showings. There was no reconsideration provision.]**
- If a recipient determines that DBE firms are so overconcentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate in this type of work, it must devise appropriate measures to address this overconcentration. **[The old rule did not have an overconcentration provision.]**

Certification and Eligibility

- Applicants must show that they meet size, group membership, ownership and control standards by a preponderance of the evidence.

[The old rule did not state a specific standard of proof.]

- Each disadvantaged individual seeking certification for his or her firm must submit a notarized certification of disadvantage and a statement of personal net worth. If an individual's personal net worth (excluding his or her principal residence and his or her interest in the applicant firm) exceeds \$750,000, the person is not an eligible DBE owner. **[The old rule did not have either a personal net worth cap for participation or a requirement to submit information concerning personal net worth.]**
- Ownership and control requirements provide detailed, specific, clarified standards for determining whether to certify firms. The standards are intended to resolve many difficult issues that have arisen in the implementation of the program. **[The less specific standards of the old regulation were interpreted in many varying ways by recipients and DOT offices, leading to inconsistent and confusing results.]**
- By February 2002, all the transit, airport, and highway recipients in each state are required to agree on a unified certification program (UCP). This program must be fully operational no later than August 2003. The UCP must provide for "one-stop shopping" for DBE firms applying for certification in each state. The applicant fills out one form, goes through one application process and, if certified, can work as a DBE for any DOT recipient in the state. There will be a single DBE directory for the state. The rule allows recipients substantial discretion about the form the UCP will take in each state. **[Formerly, a firm that wanted to work for the state highway agency, two airports, and three transit agencies in the same state had to fill out six application forms and endure six certification processes. This created significant burdens on applicants and used recipient resources inefficiently.]**
- In certifying or "decertifying" firms, recipients must provide administrative due process to ensure that procedures are fair. When a firm is certified, it normally stays certified for three years, but must inform the recipient in writing of any changes that would affect its eligibility and must submit an annual affidavit that it such changes have not taken place. **[The old rule suggested, but did not require, administrative due process. Recipients' practices varied, and some recipients processes were so lacking in due process that substantively valid decisions were overturned by the courts on procedural grounds. Many recipients erroneously believed that the Department required annual "recertifications," which burdened DBEs and used recipient resources inefficiently.]**
- All certification actions begin with a proceeding by a recipient. A party dissatisfied with the result can appeal to the DOT Office of Civil Rights. This appeal proceeding is an administrative review of the record of the recipient's action, and does not involve a new hearing before DOT. Recipients must promptly implement the Department's decision. **[The old rule lacked specific standards and procedures for certification appeals, resulting in informal and sometimes inconsistent handling of certification issues.]**

Program Administration

- A recipient can apply to the Department for a program waiver if it wants to implement the program in a way not provided for in the rule. If the Secretary believes that the recipient's idea will meet the program's objectives, he or she will approve the application. Waivers can apply to such matters as overall and contract goals, ways out of program waivers do not apply to DBE eligibility standards and procedures, which must remain uniform nationwide. **[There was no program waiver provision in the old rule.]**
- Recipients must submit revised DBE program documents to DOT, reflecting the new rule's changed requirements, by September, 1999.
- To avoid confusion and promote consistency and certainty, written guidance about the new rule is valid and binding - and represents the official position of the Department - only if it has been approved by the DOT General Counsel. Guidance issued under the old rule is no longer binding. **[The inconsistency of DOT guidance concerning the old rule led to substantial confusion and was criticized by a General Accounting Office report. Greater coordination is appropriate in an era of "One DOT."]**
- Recipients must begin to collect data about the bidders on their contracts and subcontracts, for later

use in calculating overall goals.

In the near future, DOT will develop new, uniform program data reporting and certification application forms. **[The old rule did not have similar provisions.]**